



EB-2009-0156
EB-2009-0157

IN THE MATTER OF the *Ontario Energy Board Act, 1998*,
S.O. 1998, c.15, Schedule B;

AND IN THE MATTER OF applications by EARTH
Corporation under section 86 of the *Ontario Energy Board
Act, 1998* seeking an order for leave to acquire the shares
of West Perth Power Inc. and Clinton Power Corporation;

BEFORE: Gordon Kaiser
Vice-Chair and Presiding Member

Paul Sommerville
Member

DECISION AND ORDER

On May 29, 2009, EARTH Corporation (or the “Applicant”) filed two applications with the Ontario Energy Board under subsection 86(2)(a) of the *Ontario Energy Board Act* (the “Act”), seeking leave to acquire 100% of the shares of West Perth Power Inc. (“WPPI”) and Clinton Power Corporation (“Clinton Power”). The Board assigned file number EB-2009-0156 to the application to acquire WPPI and file number EB-2008-0157 to the application to acquire Clinton Power. Pursuant to its authority under section 21(5) of the Act, the Board has considered these applications together through a consolidated hearing.

The Applications

EARTH Corporation is a holding company owned by seven municipalities that wholly owns Erie Thames Powerlines Corporation. WPPI and Clinton Power are wholly-owned subsidiaries of the Corporation of the Municipality of West Perth (“West Perth”) and the Municipality of Central Huron (“Central Huron”), respectively.

Under the terms of the Share Purchase Agreements negotiated with West Perth and Central Huron, WPPI and Clinton Power will become wholly-owned subsidiaries of the Applicant. As consideration for the acquisition, West Perth and Central Huron will acquire ownership interests in the voting and non-voting shares of the share capital of the Applicant. More specifically, West Perth and Central Huron will each receive one equal voting share and the balance in non-voting shares (representing a proportional economic ownership position in the Applicant).

The Proceeding

The Board issued its Notice of Application and Hearing on July 27, 2009. The Notice was published on August 10, 2009 in the affected service areas. There was no response to the Notice.

Procedural Order No. 1 along with Board staff interrogatories, was issued on August 27, 2009. The Applicant filed responses to the interrogatories on September 8, 2009.

Board Findings

Subsection 86(2)(a) of the Act states:

- (2) No person, without first obtaining an order from the Board granting leave, shall,
 - (a) acquire such number of voting securities of a transmitter or distributor that together with voting securities already held by such person and one or more affiliates or associates of that person, will in the aggregate exceed 20 per cent of the voting securities of the transmitter or distributor.

In determining whether to approve this application, the Board has been guided by the principles set out in the Board's decision in the combined MAADs proceeding (Board File Numbers RP-2005-0018/EB-2005-0234/EB-2005-0254/EB-2005-0257). In that decision, the Board ruled that the "no harm" test is the relevant test for purposes of applications for leave to acquire shares or amalgamate under section 86 of the Act. The "no harm" test consists of a consideration as to whether the proposed transaction would have an adverse effect relative to the status quo in relation to the Board's statutory objectives. If the proposed transaction would have a positive or neutral effect

on the attainment of the statutory objectives, then the application should be granted. The factors to be considered are those set out in section 1 of the Act, namely:

1. to protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service; and
2. to promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry.

ERTH Corporation provided the following information in support of its application:

- The proposed transaction will protect the interests of consumers with no changes to prices and adequacy, reliability, and quality of service.
- The operations centre for the subject utilities will be maintained in their current locations so expected response times will not change.
- Increased reliability of WPPI's and Clinton Power's distribution systems is anticipated as a result of the introduction of infrared scanning to the respective distribution systems and adoption of the maintenance practices of Erie Thames Powerlines (e.g. pole testing).
- Improved integrity of ongoing asset condition and increased efficiencies of WPPI's and Clinton Power's operation is expected through the introduction of complete GIS electronic mapping of WPPI's and Clinton Power's respective distribution systems.
- WPPI and Clinton Power will have access to the expertise and increased resources for the maintenance and administration of the respective distribution systems strategic, corporate and financial management, and economies of scale that ERTH Corporation can offer.
- WPPI and Clinton Power will benefit from a new "care and control" relationship with the Applicant, rather than a solely commercial relationship – the Applicant assumes managerial oversight and would have a vested interest in and responsibility for the performance of the company from a financial, operational, and customer service perspective.

Board staff issued interrogatories to obtain information regarding the valuation of the shares and transaction costs. The Board has reviewed the responses to Board staff interrogatories and notes the following:

- For each of the proposed transactions, the purchase price is above the value revealed by the valuation exercise. This means that the Applicant is paying a premium for the purchase of the respective systems. The Applicant has stated that this premium is a negotiated adjustment between the parties in order to establish acceptable proportional ownership positions for all parties. The Board notes that the August 31, 2005 combined MAADs Decision (Board File Numbers RP-2005-0018/EB-2005-0234/EB-2005-0254/EB-2005-0257) and the *Board's Report on Rate-Making Associated with Distributor Consolidation* issued July 23, 2007 established that premiums associated with an acquisition are not normally recoverable by the Applicant in distribution rates.
- The Applicant's response to Board Staff Interrogatory #2 as to whether any of the parties intend to seek recovery of the transaction costs through rates is not clear. Consistent with the Board's other MAADs decisions¹, the Board expects that all transaction costs are to be borne by the shareholder of the acquirer and are not recoverable through rates.

Based on the evidence in this proceeding, the Board finds that subject to two conditions outlined below, the proposed transactions will not have an overall adverse effect in terms of the factors identified in the Board's objectives in section 1 of the Act.

Accordingly, the Board finds that the proposed transactions reasonably meet the "no harm" test. However, the Board's approval of the proposed transactions is subject to the following conditions:

¹ EB-2009-0282 (Application by FortisOntario Inc. for leave to acquire shares of Great Lakes Power Distribution Inc.)

EB-2008-0339 (Application by Town of Cochrane for leave to acquire shares of Northern Ontario Wires Inc.)

Neither the Applicant nor any other party acting under its direction or control shall make an application to recover any portion of acquisition premiums paid in connection with these transactions. Similarly, neither the Applicant nor any other party acting under its direction or control shall make an application to recover any portion of any of the transactions costs incurred in connection with these transactions.

THE BOARD ORDERS THAT:

1. ERTH Corporation is hereby granted leave to acquire 100% of the shares of West Perth Power Inc. and Clinton Power Corporation pursuant to subsection 86(2)(a) of the Act.
2. The Board's leave to acquire shall expire 18 months from the date of this Decision and Order. If either transaction has not been completed by that date, a new application for leave to acquire will be required in order for the transaction to proceed.
3. ERTH Corporation shall file a report on the costs borne by the ratepayer for these acquisitions with the next Cost of Service rate applications for West Perth Power Inc. and Clinton Power Corporation, delineating any acquisition premiums paid, and transaction costs incurred in connection with these acquisitions.
4. ERTH Corporation shall promptly notify the Board of the completion of each of the transactions.

DATED at Toronto, October 8, 2009

ONTARIO ENERGY BOARD

Original Signed By

John Pickernell
Assistant Board Secretary